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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AVAYA INC., a Delaware corporation,

Case No. 3:19-cv-00565 SI

Plaintiff,

**JOINT STATEMENT OF DISCOVERY
DISPUTE REGARDING AVAYA'S
INTENTION TO CONTACT AND
SUBPOENA CUSTOMER ENTITIES**

v.

RAYMOND BRADLEY PEARCE, et al.,

Hearing via Videoconference Requested by
Atlas

Defendants.

Judge: Honorable Susan Illston

Pursuant to Section 3 of Your Honor's Standing Order, Plaintiff Avaya Inc. ("Avaya") and Defendant Atlas Systems, Inc. ("Atlas") submit this Joint Statement of Discovery Dispute regarding Avaya's intention to contact and subpoena customer entities. The parties met and conferred by videoconference on January 15, 2021. Plaintiff agreed not to contact any Atlas customer unless and until permitted by the Court. The parties agreed to postpone the submission of this statement pending participation in a mediation which took place on February 17, 2021.

1 **I. ATLAS'S STATEMENT**

2 Defendant, Atlas Systems, Inc. seeks a protective order prohibiting Plaintiff, Avaya, Inc.,
 3 from contacting or issuing subpoenas to Atlas's customers pursuant to FRCP 26 (c)(1)(A) and
 4 45(d)(1) and (3). The need for such a protective order was previously demonstrated. (Doc. 204.) In
 5 response, this Court issued a protective order on July 2, 2020 stating: “[T]he Court is mindful of
 6 the concerns Atlas has raised about its customers, and instructs Avaya that if it wishes to contact
 7 Atlas' customers, it may do so only by providing Atlas with 5 days advance notice of such contact.
 8 If Avaya wishes to subpoena any Atlas customers, it may only do so by stipulation or upon a
 9 showing of good cause to the Court.” (Doc. 205 at 1.) Good cause is lacking. Avaya wants to
 10 contact and subpoena customers before it has taken a single deposition of a single defendant.
 11 Avaya fails to provide the subpoena or the specific information it seeks from customers, let alone
 12 explain what material information customers have that Avaya cannot obtain from a less
 13 burdensome source, including Avaya itself. *As the Court has previously recognized, contacting
 14 customers will have a devastating effect on Atlas's business, as Atlas previously explained.*
 15 (Docs. 204; 205.) Harm to Atlas is not outweighed by any alleged benefit to Avaya because
 16 customers have no relevant information Avaya does not already have.

17 Under Rule 45(d)(1), a party seeking discovery from a non-party via subpoena “must take
 18 reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena”
 19 and the court “must enforce this duty.” Under Rule 45(d)(3), the court “must” quash or modify a
 20 subpoena that subjects the recipient to undue burden. “The Ninth Circuit has long held that
 21 nonparties subject to discovery requests deserve extra protection from the courts.” *Lemberg Law
 22 LLC v. Hussin*, No. 16-mc-80066-JCS, 2016 WL 3231300, at *5 (N.D. Cal. June 13, 2016).

23 A party must limit discovery if it can be obtained from another more convenient
 24 source. Fed. R. Civ. P. 26(b)(2)(C)(i); *Anderson v. Ghaly*, No. 15-cv-05120-HSG, 2020 WL
 25 3184494, at *10 (N.D. Cal. June 15, 2020). “The scope of permissible discovery under Federal
 26 Rule of Civil Procedure 26(b)(2) is not unlimited, and it is the court’s duty to consider whether
 27 ‘the burden or expense of the proposed discovery outweighs its likely benefit...’” *Farmer v.
 28 Senior Home Companions of Indiana, Inc.*, No. 1:08-cv-0379-DFH-JMS, 2009 WL 564193, at *2
 (S.D. Ind. Mar. 5, 2009) (**quashing subpoena served on defendant's customers**); see also
HDSherer LLC v. Natural Molecular Testing Corp. 292 F.R.D. 305, 308 (D. S.C. 2013) (**same; subpoena will harm customer relationships**); *Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC*, No. 4:16-cv-00427-DCN, 2017 U.S. Dist. LEXIS 178778, at *7-8 (D. Idaho Oct. 26, 2017) (**same; trademark case**); *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 306
 n.2 (S.D. Ind. 2016). Similarly, here, customer discovery is very harmful to Atlas and Avaya has
 not tied any information from any customer to any element of its claims or explained why any
 particular information can't be obtained from Avaya or Atlas. Avaya cites *Blankenship v. Hearst
 Corp.*, 519 F.2d 418, 429 (9th Cir. 1975), which does not involve third party discovery.

29 **There Is No “Good Cause” Required by the Court’s Order (Doc. 205).** Avaya wrongly claims
 30 that Atlas advances a “double standard” based on two interrogatories. Not so. The TAC alleges
 31 that Avaya has copyright registrations on software that runs its IP Office Business phone system
 32 and that Atlas “distributed software infringing Avaya’s copyrights.” (Doc. 249, ¶ 22; see also ¶¶48
 33 58.) Atlas did not do so. It served interrogatories asking Avaya for facts supporting its claim. (Ex.
 34 1.) Interrogatory 7 asks about direct copyright infringement by Atlas. To answer Rog 7, Avaya
 35 would identify the product(s) in Atlas's sales reports (which Atlas previously produced) that
 36 Avaya contends constitutes Avaya's copyrighted-registered software. Avaya's responses reveal no
 37 such products. *See* Ex. 1. Avaya's direct infringement claim relies on a (faulty) legal argument that
 38 selling license keys (which are not copyright-registered and which are functional and not subject
 to copyright protection under Copyright Office Compendium Third § 721.7) constitutes

1 “distribution” of its IP Office software under 17 U.S.C. § 106, and therefore, direct copyright
 2 infringement. **Customers have no discoverable information on this legal issue**, and Avaya fails
 3 to identify any such information customers would have. Atlas does not contend it sold “random”
 4 keys as Avaya argues. Each key Atlas sold was genuine, created on Avaya’s system by Avaya,
 5 and functioned as Avaya intended when Avaya accepted the keys and unlocked phone features.

6 Interrogatory 8 asks about indirect infringement by Atlas, which requires the end-user to
 7 perform an act enumerated in 17 U.S.C. § 106. *Miller v. Facebook, Inc.*, No. C 10-00264 WHA,
 8 2010 WL 1292708, at *3 (N.D. Cal. Mar. 31, 2010); *A & M Records, Inc. v. Napster, Inc.*, 239
 9 F.3d 1004, 1013 n.2 (9th Cir. 2001). Avaya alleges that defendants’ customers “use, copy and
 10 distribute” Avaya’s copyrighted work. (Doc 249 at ¶ 76.) “Use” is not an exclusive right in 17
 11 U.S.C. § 106, and thus cannot be the basis of a copyright infringement claim. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 463 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975). Thus, the end-user must copy or distribute the registered work. They do not, as revealed in Avaya’s rog response. *See* Ex. 1. Avaya states below “Atlas’ customers will be able to confirm ... the steps that the customer took to use, run, and copy the infringing software.” **Avaya already has this information**; it knows how its products work and how, if at all, customers “copy and distribute” Avaya’s copyrighted work, which Avaya alleged in its TAC. (Doc 249 at ¶ 76.) Neither Avaya’s interrogatory responses (Ex. 1) nor initial disclosures (Exs. 2-3) nor its section below states that it needs information from customers to prove its claims.

12 **Avaya’s Argument Regarding Telcom Is Premature and Involves Only One Customer.** Avaya argues below that discovery from customers is relevant to the Lanham Act issue of whether
 13 customers were confused. That defies reason. Atlas and DBSI have confirmed that they will not
 14 challenge likelihood of confusion – Atlas sold product to customers as genuine Avaya products.
 15 Avaya argues below that “Telcom” a brand new defendant, may take a different position. There is
 16 no reason to believe that. In any event: (1) there is only one customer at issue with regard to
 17 Telcom, Sourcing Solutions, whom Avaya contacted in 2016; and (2) Avaya’s request for
 18 customer contact and subpoenas is premature before Telcom makes an appearance.

19 **Customers Have No Information on the First Sale Defense.** Avaya argues that it may need to
 20 respond to a fair use defense to the copyright claim by showing that “infringing used software
 21 licenses were not licensed to Atlas’ customer.” **Customers have no evidence that they are not**
 22 **licensed. Avaya knows which end users are licensed, as it accepted the keys and unlocked phone**
 23 **features.** Avaya asks, “Did the customer really not think that it was getting a valid Avaya software
 24 license?” No. It’s undisputed that Atlas sold the keys as genuine Avaya product, as Avaya’s
 25 complaint alleges and as Atlas acknowledges. Avaya asks, “Did the license key sold by Atlas not
 26 distribute to the customer the specific software and/or software features that the customer
 27 ordered?” This is the same legal issue above as to “distribution” of software under § 106.

28 **Customers Threw Packaging Away.** Avaya alleges that “information from Atlas’ customers
 29 would also be directly relevant to Atlas’ purported Lanham Act fair use defense.” This is relevant
 30 only to the claim of “counterfeit packaging” of phones that Atlas sold in 2015 and 2016, which
 31 Avaya admits knowing about in 2016. (Doc. 249, ¶56.) Packaging is typically promptly thrown
 32 away; there is no reason to believe that any customer saved any packaging from 2016.

33 **There Is No Basis for a Third Party Fishing Expedition Regarding 13,000+ Products.** Only
 34 one batch of 1,600 phones is at issue in the counterfeit claim. They are not “still in the hands of
 35 customers.” Avaya has them, as shown in a photo in the McCann declaration. (Doc. 231-3, ¶14.).
 36 Avaya states that because Atlas purchased allegedly counterfeit phones from Defendant Telcom in
 37 2016, thousands of other products purchased from Telcom since then “very likely include
 38 counterfeits.” Such speculation is no justification for harassing Atlas’s customers; no other alleged
 39 counterfeits have come to light in the past five years. Avaya admits it knew about the allegedly

1 counterfeit phones since 2016, (Doc. 249, ¶ 56), and certainly knew its phones were in use in
 2 “sensitive applications” back then, but did nothing for years. Avaya now rushes to get discovery
 3 from Telcom’s customers before Telcom appears in this action and before Avaya takes discovery
 4 from Telcom, without even informing the court what, precisely, it seeks. This is improper.

5 **Complaints Were Previously Produced.** Avaya wants “complaints from customers.” Atlas
 6 produced documents regarding customer complaints. And customers who purchased Avaya-
 7 branded products know that they can complain directly to Avaya. According to Avaya, one
 8 customer did so in 2016. (Doc. 249, ¶ 56.) Customers have no information Avaya doesn’t have.

9 **Customers Don’t Have Damages Information:** Customer information is irrelevant to whether
 10 this is an “exceptional case.” Customers will not shed light on what Atlas knew about the
 11 provenance of products Atlas admits it sold as genuine Avaya product. Atlas believed the products
 12 were genuine, and, as the complaint alleges, represented them as such. Nothing in Avaya’s Initial
 13 Disclosures, Exs. 2-3, has any damage computation requiring customer information, and not one
 14 customer is identified as a person with discoverable information. Avaya claims that customer
 15 evidence is “relevant to … elasticity” and “collateral and/or convoyed sales.” Avaya’s initial
 16 disclosures are silent as to these theories. (Exs. 2-3.) A party may not pursue a damages theory not
 17 identified in its Rule 26 disclosures. *TCF Inventory Fin., Inc. v. Northshore Outdoor, Inc.*, No. 1:
 18 11 CV 85, 2012 U.S. Dist. LEXIS 91997, at *10-11 (N.D. Ohio July 3, 2012). Evidence of
 19 convoyed sales is not discoverable from customers. *Paradox Sec. Sys. v. ADT Sec. Servs.*, No.
 20 2:06-CV-462 (TJW), 2008 U.S. Dist. LEXIS 128168, at *7 (E.D. Tex. Nov. 12, 2008) (“The Court
 21 agrees with the [defendant] that plaintiffs do not need defendants’ customer lists to determine
 22 convoyed sales or inducement of infringement.”) Because of the magnitude of this issue for Atlas,
 23 and 2.5 page limitation, if the Court is inclined to permit customer discovery, Atlas requests
 24 leave to file a noticed motion with oral argument.

15 II. AVAYA’S STATEMENT

16 Atlas’ arguments for a protective order barring all discovery from its customers have
 17 already been rejected by the Court in its July 2, 2020 Discovery Order, Dkt. No. 205, where the
 18 Court set forth a process for this customer discovery to proceed. Same as then, Atlas’ arguments
 19 above to bar such discovery rely on misdirection and misapprehension of the facts and law. In the
 20 end, Atlas does not – and cannot – remotely meet its burden in establishing good cause to enter an
 21 order blocking all customer discovery. *Blankenship*, 519 F.2d at 429 (requiring good cause).
 22 Atlas has already successfully delayed such discovery by over six months, and its plainly stated
 23 intention to try to use its customers as both sword and shield is inequitable to say the least.

24 As a preliminary matter, Atlas cannot, on the one hand, assert any defense or affirmative
 25 defense, based in whole or in part, on any matter relating to its customers, while blocking
 26 discovery into these same customers. Here are two stark examples from Atlas’ interrogatories:

- 27 • Atlas Interrogatory No. 7 states: “If you contend that Atlas’s customers infringe
 28 Avaya’s registered copyrights by using Avaya’s software, as alleged in Paragraph 74 of
 29 the Second Amended Complaint, STATE ALL FACTS that support such contention,
 30 including, but not limited to, for each infringement: 1)IDENTIFY the customer(s) who
 31 allegedly used the Avaya software and the date of such use; 2) the title, version,
 32 publication date and authors of the Avaya software that was allegedly used; 3) the
 33 portion of the Avaya software that is allegedly protected by copyright; 4) the Avaya
 34 Registration Numbers that cover the software; and 5) explain how such use of Avaya’s
 35 software constitutes a violation of Avaya’s exclusive rights under 17 U.S.C. § 106.”
- Likewise, Atlas Interrogatory No. 8 seeks similar specifics about Atlas’ customers
 36 relating to whether Atlas induced those customers to infringe Avaya’s copyrights.

1 See Ex. 1, Responses to Atlas' Third Set of Interrogatories, at Interrogatory Nos. 7-8. These
 2 exemplar requests highlight the plain double standard that Atlas seeks to impose, in attempting to
 3 defend against Avaya's claims based on its own customers, while at the same time blocking
 4 Avaya from getting parallel discovery from both Atlas and its customers about these same issues.
 5

6 Consistent with Atlas' discovery requests, Atlas apparently contests whether it induced its
 7 customers to violate Avaya's copyrights. Atlas also appears to contest whether it offered for sale
 8 and then distributed to its customers Avaya software and software licenses (as Avaya alleges),
 9 rather than simply a random set of alphanumeric keys that just happen to unlock the exact Avaya
 10 software the customer ordered (as Atlas disingenuously argues). Atlas' customers will be able to
 11 confirm that they understood that Atlas was offering them, and that they were purchasing, specific
 12 Avaya software and/or software features and what they thought was a valid license to use the
 13 same, not just random key codes. As to Atlas' request for all of "the circumstances of the
 14 infringement" above, Atlas' customers will be able to confirm not only that Atlas distributed the
 15 same to them in exchange for money, but also the precise steps that the customer undertook to
 16 load the infringing software licenses into their systems and then the steps that the customer took to
 17 use, run, and copy the infringing unlicensed software, as both the customer and Atlas intended.
 18 These issues, of course, are relevant to Avaya's direct and indirect copyright infringement claims,
 19 as Atlas' own interrogatories above also show. *See, e.g., S.O.S., Inc. v. Payday, Inc.*, 886 F.2d
 20 1081, 1087 (9th Cir. 1989); *see also MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511,
 21 518-19 (9th Cir. 1993). And that is just the tip of the iceberg.

22 Discovery of Atlas' customers is also directly relevant to Atlas' claimed affirmative
 23 defenses. Atlas' confusing recitation of the first sale doctrine and license issues above proves the
 24 point. As discussed above, Atlas disingenuously contends that it merely distributed random
 25 alphanumeric key codes here. This assertion of course is a blatant attempt to avoid settled Ninth
 26 Circuit law that the first sale doctrine does not apply to software licenses. *Vernor v. Autodesk, Inc.*,
 27 621 F.3d 1102, 1107 (9th Cir. 2010). However, this also puts their customers directly at
 28 issue. Did the customer really think it was getting a random key code, not an Avaya software
 license? Did the license key sold by Atlas not distribute to the customer the specific software
 and/or software features that the customer ordered? Atlas cited and then deleted *Adobe Sys. Inc. v. A&S Elec., Inc.* because it puts Atlas' license key argument to rest, as it held that "even if the
 serial license key is not separately subject to copyright protection, Defendants' alleged distribution
 of the code to facilitate the sale and use of software it had no right to distribute is sufficient to state
 a claim for copyright infringement." 153 F.Supp.3d 1136, 1144 (N.D. Cal. 2015). Because Atlas
 has asserted a first sale doctrine defense, Avaya may also need to show that Atlas' customers did
 not have a valid license for previously sold licenses. *Adobe Systems Inc. v. Christenson*, 809 F.3d
 1071, 1079 (9th Cir. 2015). Customer discovery is also relevant to any trademark fair use defense,
 including whether Atlas used more of Avaya's marks than necessary and whether Atlas falsely
 suggested sponsorship, endorsement or authorization in its communications with customers.

29 Discovery of Atlas' customers is also directly relevant to elements of Avaya's affirmative
 30 claims. For example, Atlas has contested whether products it sold are counterfeit. Dkt. No. 239.
 31 More of such products of course are still in the hands of its customers. By challenging both the
 32 counterfeit analyses themselves and whether sampling is appropriate, Atlas has made further
 33 discovery of counterfeit products in their customers' possession necessary. Atlas' contention that
 34 Avaya already has some voluntary information from the one customer, who bought the 1600+
 35 counterfeit phones identified in the Complaint, and that the counterfeit phones had to be replaced,
 36 is not well taken. Here, Atlas is even attempting to block further contact with that customer
 (Sourcing Solutions, which then sold the counterfeit products to a large wireless carrier). As
 37 Avaya alleged "[t]his is but one example of Atlas' counterfeiting," (Complaint, ¶56); indeed, Atlas
 38

1 bought over 15,000 Avaya products from the same counterfeit source alone, Defendant Telcom
 2 International (“Telcom”), dwarfing the 1600+ counterfeit phones alleged in the Complaint. The
 3 remaining 13,000+ Avaya products very likely include counterfeits, including those trafficked into
 4 government, healthcare, and other sensitive areas. For example, Atlas purchased 3000 Avaya
 5 Model 6221 phones from Telcom in June 2019, and then resold 200 of these phones to the Naval
 6 Undersea Warfare Center on April 1, 2020. And Atlas has other high volume purchases of “new”
 7 Avaya products from highly suspect sources. All of these warrant close inspection and discovery.

8 Further, Atlas contends the alleged unlawful conduct was not willful or knowing, making
 9 what Atlas represented to the customers about the provenance, quality, and/or authenticity of the
 10 infringing/stolen software licenses and the counterfeit products and counterfeit packaging directly
 11 relevant. Atlas does not dispute this point above. Did Atlas represent the infringing and/or stolen
 12 products as “new” or “genuine” despite all the red flags? Has Atlas informed its customers that
 13 products Atlas bought from Telcom have a high likelihood of being counterfeit? Did Atlas’
 14 customers question the provenance, quality, and/or authenticity of such products and what was
 15 Atlas’ response? This last point is all the more important, because Atlas has claimed in discovery
 16 not to keep any record of complaints from customers, except for haphazard reporting regarding
 17 returns in its Quickbooks database. And, while Atlas and the DBSI Defendants have confirmed
 18 that they will not defend against any claim based on a defense of likelihood of confusion, Telcom
 19 may not agree. So consumer confusion discovery is still relevant here.

20 Next, discovery regarding Atlas’ customers also is highly relevant to calculation of
 21 damages. In addition to exceptional case and willfulness evidence discussed above, customer
 22 evidence is also, for example, directly relevant to understand elasticity, including but not limited
 23 to price sensitivity and substitutability. Customer evidence is also relevant to understanding
 24 collateral or convoyed sales, and the importance of being able to offer cut-rate software licenses in
 25 being able to sell other products and services. Despite Atlas’ feigned confusion above, these are
 26 standard metrics that are often analyzed in calculating lost profits, which is disclosed in Avaya’s
 27 Complaint and Initial Disclosures at p. 9:18-23. Atlas cites only one unpersuasive case that denied
 28 a motion for U.S. customer data on convoyed sales, where the circuit was “manufactured and sold
 outside the United States...” *Paradox*, at *1. And, of course, customer contact regarding
 counterfeit products that are still in these customer networks is vital for damages mitigation, not to
 mention to reduce harm to these customers and those they serve. Atlas has no answer there either.

29 Any one of the above issues constitutes sufficient relevance to allow customer discovery,
 30 and taken together Atlas’ obstruction of such discovery is egregious. But, even if Atlas could
 31 establish “good cause” here, the Court should then balance the interests in allowing discovery
 32 against the relative burdens that would be imposed. *Braun v. Primary Distributor Doe Number 1*,
 33 2013 WL 12142998 (N.D. Cal. Jan. 11, 2013). Here, any burden is minimal, and these customers
 34 are Avaya customers, so Avaya has no interest in creating undue burden for them. There is also a
 35 stipulated protective order in place to protect confidentiality. And Atlas’ other cited caselaw is
 36 inapposite, relating to privileged information, overbroad discovery after the cut-off, where the
 37 Defendant agreed to or was ordered by the Court to produce the responsive documents, or is
 38 otherwise irrelevant here. At base, a protective order barring all customer discovery is not
 39 remotely warranted and would cause substantial prejudice to Avaya and its ability to present its
 40 case. Atlas’ arguments are also not sufficient to require a hearing or a fully noticed motion.
 41 Avaya therefore respectfully requests that the Court allow Avaya to contact any Atlas customer
 42 necessary for purposes of this litigation, with 5 days notice to Atlas, as set forth in the Court’s July
 43 2, 2020 Order, and to allow subpoenas to issue to up to 20 Atlas customers, with leave to seek
 44 more customer discovery, if necessary. Unless it seeks interlocutory appeal, Atlas has also agreed
 45 to finally provide customer address and contact information if the Court denies its request here.

1 Dated: March 1, 2021

Respectfully submitted,

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DATED: March 1, 2021

Respectfully submitted,

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